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State v. Donndelinger Appellant's Reply Brief Dckt. 39999

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IN THE SUPREME COURT OF THE STATE OF IDAHO

THE STATE OF IDAHO)

Plaintiff/Respondent,)

vs.)

THOMAS DONNDELINGER,)

Defendant/Appellant.)

Supreme Court Docket No. 39999-2012

CASE NO. CRMD2010-199

APPELLANT REPLY BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

MICHAEL OTHS
Magistrate Judge

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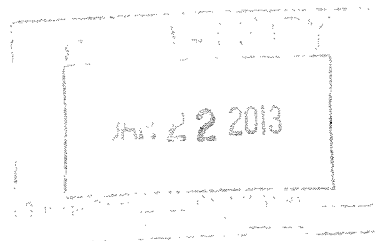


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TABLE OF CASES AND AUTHORITIES

Cases

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Foundation Was Not Laid For Admission Of The Breath Test By Failing To Comply With The Purpose Of The Fifteen-Minute Observation Period

The Respondent argues that the Magistrate correctly concluded that foundation was properly laid for admission of Appellant's breath test. Specifically that Respondent argues that Officer Murakami's testimony that she could hear and see Donndelinger throughout the fifteen-minute observation period and that her interaction with Donndelinger was such that she was aware of his increasing anxiety and tried to assist him in calming down showed compliance with the observation period. (Respondent's brief, p. 4.)

In determining whether foundation was properly laid for entry of the breath alcohol test as it applies to the fifteen-minute observation period, the Appellate Court has adopted an analysis which focuses on determining whether the observation comports with the purpose of the Manual which is to "reduce the risk of invalid test results from various conditions which might occur after the time of the arrest." *State v. Remsburg*, 882 P.2d at 996, 126 Idaho at 341 (Ct.App. 1994) (citing *Bradley*, 120 Idaho at 569, 817 P.2d at 1093).

Because the evidence proffered is a scientific test result, proper foundation is necessary to ensure an accurate test. With that standard in mind, Officer Murakami's ability to observe Donndelinger's anxiety does not, of itself, show that Officer Murakami closely observed Donndelinger for the fifteen minutes prior to the breath test to satisfy the intended purpose of ensuring that Donndelinger did not burp, belch, or otherwise regurgitate material from his stomach during that **entire** period of time. (Emphasis added). If the purpose of the observation period is to ensure the test subject did not burp or belch during that critical fifteen minutes prior to the test, those intermittent seconds of time when the observing Officer was pre-occupied with other tasks in an environment where external conditions prevent employment of all senses necessary to fulfill the purpose of the observation period, those seconds are the critical times that determine compliance with the foundational requirements of the test.

The totality of the evidence presented shows that Officer Murakami did not conduct a fifteen-minute observation period that comports with the purpose of the SOP

Manual. It was error for the Magistrate to find that compliance with the procedures of the SOP Manual were met and that foundation had been laid for admission of the breath test. The breath test should have been excluded. Because the DUI was pursued as a *per se* violation and not under the theory Donndelinger was impaired by alcohol, the Magistrate further erred in denying Appellant's request for a Judgment of Acquittal or in the alternative a new trial.

The Prosecutor's Misconduct Was Sufficiently Egregious To Deprive Appellant Of His Constitutional Right To A Fair Trial

Contrary to Respondent's argument that this was proper rebuttal and outside the requirements of disclosure pursuant to Idaho Criminal Rule 16(b)(7), the testimony of the State's expert fell clearly within the rule requiring disclosure. The decision by the Prosecutor to not disclose the testing and opinions of the State's expert prior to trial was a tactical decision by the Prosecutor to gain an unfair advantage.

The Prosecutor argued to the Magistrate that disclosure of the expert witness's testimony was not required because the witness did not testify in the Prosecutor's case in chief but was held for rebuttal. However, it was clear from the testimony presented during trial and the argument of the Prosecutor that the expert witness had prior knowledge of the defense theory of the case, witness testimony, and scientific testing conducted by defense witnesses. Tr. JT P 391-406. This information was provided through the defense responses to the Prosecutor's specific requests for discovery. The Prosecutor then used that information to prepare their expert witness who then conducted his own testing and research in advance of trial.

By couching the expert testimony as rebuttal and failing to respond to Appellant's specific requests for discovery, the State denied Appellant his Sixth Amendment right to meaningful cross-examination of the State's expert. See *State v. Araiza*, 124 Idaho at 91 (Idaho 1993). Because the testimony of the State's expert went to the crux of Appellant's case, the Prosecutor's misconduct cannot be viewed as harmless. The Magistrate erred in denying Appellant's request for a new trial.

Denying Appellant's Request To Exclude The Un-redacted Video Or In The Alternative Declare A Mistrial Was Prejudicial Error And Contributed To An Accumulation Of Errors Requiring A New Trial

After the Magistrate had ruled on the parameters of evidence the Prosecutor would be allowed to introduce the Prosecutor moved for the admission of State's Exhibit 1. The Prosecutor had proffered the exhibit as containing evidence the Magistrate had allowed. The Prosecutor failed to inform the Magistrate or Defense Counsel that the video exhibit also contained evidence specifically disallowed by the Magistrate. Tr JT P. 22 Ls 7-25, P. 23, 24, and 25. Appellant objected to the exhibit's admission and later moved for a mistrial. The Magistrate denied Appellant's motion for a mistrial and the exhibit containing evidence previously found to be unfairly prejudicial and inadmissible was admitted.

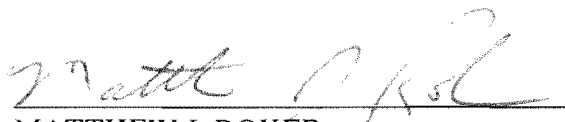
Appellant argues it was error to admit State's Exhibit 1 and further error to deny the request for mistrial. Should the Court find the error was harmless then Appellant argues the accumulation of errors as previously argued in Appellant's Brief denied Appellant a fair trial. See *State v. Martinez*, 125 Idaho 445, 872 P.2d 708 (1994).

CONCLUSION

Because proper foundation was not laid for admission of the breath alcohol test, the Judgment of Acquittal should be granted or in the alternative a new trial ordered. In the alternative this Court should set aside the guilty verdict and order a new trial as the errors committed at trial, separately or cumulatively, denied Appellant a fair trial.

RESPECTFULLY SUBMITTED this 22nd day of January, 2013.

LOVAN ROKER & ROUNDS, P.C.



MATTHEW J. ROKER
Attorneys for Defendant/Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 22nd day of January, 2013, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

MICHAEL OTHS

MAGISTRATE COURT JUDGE

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